UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

AUTO TRUCK TRANSPORT CORPORATION

Employer

TEAMSTERS LOCAL UNION NUMBERS 71, 171, 223, 299, 512, 557, 657, 745, 773, 878 & 957 A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

and Case 5-RC-15805

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

The sole issue in this proceeding is whether the collective-bargaining agreement between the Intervenor ("IAM") and the Employer ("ATT") operates as a contract bar to the petition filed by the Petitioner ("Teamsters") on December 14, 2004.[1] The Intervenor has represented the employees at issue since the late 1980s. The Employer and the Intervenor are currently parties to a collective-bargaining agreement effective November 1, 2004 – October 31, 2007.

The Petitioner seek to represent all driveaway lowboy drivers, yard employees, and shop employees employed by the Employer at its facilities in Portland, Oregon; Laredo, Texas; Garland, Texas; Conway, Arkansas; Jacksonville, Florida; Springfield, Ohio; Dublin, Virginia;

[1] All dates herein refer to 2004, unless otherwise noted.

Detroit, Michigan; Macungie, Pennsylvania; Cleveland, North Carolina; Mt. Holly, North Carolina; and Baltimore, Maryland; but excluding all other employees, including independent contractors, confidential employees, professionals, guards and supervisors as defined in the Act. Petitioner contends that either or both of its petitions – filed on December 3 and December 14 – were received by Region 5 before the Intervenor and the Employer had executed a contract which could operate as a bar to election. There are approximately 1480 employees in the petitioned-for unit.

The Employer and the Intervenor maintain that they formed and executed a contract sufficient to operate as a bar to election on December 2, prior to the Petitioner's first petition in Case 5-RC-15801 which was filed on December 3. Alternatively, they claim that the Petitioner's petition in Case 5-RC-15801 does not raise a question concerning representation and therefore should not be considered for contract bar purposes. Therefore, they argue, the operative date by which a contract must have been completed and executed is December 14, when the Petitioner's second petition was filed. The Intervenor and Employer contend that their contract operated as a bar prior to December 14 – either on December 2, 8, 11, or 13-14 – and thus the instant petition must be dismissed.

I have carefully considered the evidence and arguments presented by the parties on these issues. As discussed below, I conclude that no contract existed sufficient to bar election prior to December 14, the same day Petitioner's second petition was filed. I find that since the Employer knew the petition was being filed prior to the time the contract had been completed under

contract bar rules, the contract cannot serve as a bar. *Rappahannock Sportswear Co.*, 163 NLRB 703 (1967).[2]

The Employer presented testimony from Forest Guest, ATT's Executive Vice-President of Labor Relations and chief negotiator for the Employer. The Intervenor presented testimony from Boysen Anderson, Automotive Coordinator for the IAM and its chief negotiator, and Gene Bechbolt and Charles Rice, unit employees who were on IAM's negotiating committee. The Petitioner presented testimony from Jack Curran, Teamsters Eastern Region Organizing Coordinator and Dwight Coleman, a unit employee who was on the IAM's negotiating committee.

FACTUAL SETTING

Procedural Posture – Previous Proceedings Before the Board

The history between the parties regarding this matter is long and acrimonious, and bears some relevance to the present proceedings. In brief, in 2003 the Teamsters sought permission from the AFL-CIO to seek to represent ATT's employees who were currently represented by IAM. The AFL-CIO authorized the Teamsters to seek representation of ATT's employees at 11 of its 12 terminals – all of them except the terminal in Dublin, Virginia. On December 23, 2003, the Teamsters filed a petition with the Board's Regional Office in Texas (Case 16-RC-10551) to represent all of the employees at issue in the instant case with the exception of those in Dublin. On or about June 9, 2004, Region 16 dismissed the petition, finding that the only appropriate unit must encompass employees at all 12 terminals. On July 15, 2004, the Board denied the

[2] Of course, since I find that no bar existed on December 14, I find that no bar existed on December 3, the day Petitioner's first petition, Case 5-RC-15801, was filed with the Region. In so deciding, I deny the Employer's "Motion to Consolidate with Case 5-RC-15801, and to Transfer Proceedings to the Board." See Board's Rules and Regulations Sec. 102.67(h)-(j); see also *NLRB Casehandling Manual, Part Two, Representation Proceedings, Section 11273.*

Teamsters Request for Review of the Regional Director's Decision and Order in Case 16-RC-10551. On December 3, 2004, the Teamsters filed a petition in Region 5 (Case 5-RC-15801) which was identical to the petition that had been dismissed less than five months earlier, seeking to represent all of the employees in the instant case minus those in Dublin.[3] The Teamsters made clear, however, that although they would object to any decision requiring the Dublin employees' inclusion in the unit, they would go forward in any unit found appropriate by the Regional Director. On or about December 15 the undersigned dismissed the petition in Case 5-RC-15801, finding that the petitioned-for unit had already been found inappropriate by the Board and declining to offer the Teamsters a second bite at the apple as a way to circumvent the AFL-CIO's previous ruling prohibiting the Teamsters from seeking to represent the Dublin employees. The day before Case 5-RC-15801 was dismissed, the Petitioner filed the instant petition seeking to represent employees at all 12 of ATT's terminals – the unit found appropriate by the Board. The Petitioner also appealed the undersigned's decision in Case 5-RC-15801 to the Board; that appeal, which was held in abeyance pending the outcome of lengthy Article XX proceedings before the AFL-CIO, remains pending before the Board

Bargaining History

Background

As noted above, the Intervenor has represented the petitioned-for unit since approximately the late 1980s. In 2001, ATT and IAM entered into a collective-bargaining agreement effective from March 1, 2001 – March 1, 2005. The parties agreed to negotiate a new agreement on or about November 1, 2004. Teams of negotiators met for several consecutive

[3] The Petition in Case 5-RC-15801 was amended on December 10 – however the date of the original petition is controlling for contract bar purposes. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 fn. 12 (1958); *Illinois Bell Telephone Co.*, 77 NLRB 1073 (1948).

days at the beginning of November 2004 and on November 10, the chief negotiators for each party (Anderson and Guest) initialed a Tentative Agreement. Language in the Tentative Agreement provided that it would be retroactive to November 1, 2004. The text of the Tentative Agreement further required that it be "subject to the ratification of the membership."

The IAM held a ratification vote between November 15 and November 29. Ratification of the Tentative Agreement failed. On November 30, Anderson notified Guest that the Tentative Agreement had been rejected and that the IAM was prepared to continue negotiations.

December 1-2, 2004

On Wednesday December 1, Anderson and Guest talked by telephone and exchanged e-mails regarding a few issues which they believed had caused the rejection of the Tentative Agreement. In his initial e-mail to Anderson, Guest addressed four issues: pension, wage increases, undecking payments (undecking is a particularly complicated method of unloading trucks), and ratification bonus. He did not provide any specific proposals to modify any of these portions of the Tentative Agreement. Later on December 1, Anderson e-mailed Guest. He rejected Guest's idea to make changes to the pension. For wage increases, he suggested a one cent increase per mile each contract year for drivers and a 35 cent increase per hour for shop employees during the first contract year. His response to undecking payments is written as follows: "increase the multi undecking???". Anderson suggested eliminating the ratification bonus. Finally, he raised another issue: lodging. Article 10, paragraph 11(b) of the Tentative Agreement provided that if a driver did not stay at a motel listed in the "Corporate Lodging" book, and did not obtain prior authorization to stay "out of book", ATT would only reimburse the driver up to $41.00. In his December 1 e-mail, Anderson suggested that the parties "delete

language on the motel or increase to $60.00," – this is all he wrote on the lodging issue.

Anderson then discussed how the parties would proceed if ATT agreed to the Union's proposals:

> Here's how the IAM would propose this to the members if you could agree to this. I would send notice to the members advising them of the 3 issues that [had] been brought before the negotiating committee that resulted in the T/A [Tentative Agreement] not being ratified. I would ask the members to vote to give the negotiating committee the authority to meet with ATT on these issues. It [If] the committee could reach resolutions on these issues the committee has the authority to sign the agreement. This will allow us to get it done and you want [won't] have to worry about this getting voted down. [Employer Exhibit 7].

On December 2, Guest responded to Anderson's e-mail, also by e-mail. His e-mail states that ATT would increase the undecking compensation by $1.00 in each year of the contract, would increase shop wages by 35 cents in the first year of the contract, would add one cent per mile to driver wages for each year of the contract, and would delete the last sentence of the Corporate Lodging provision -- language that limited the amount a driver could be reimbursed for an "out of book" hotel stay. The last substantive paragraph of his e-mail reads as follows:

> As I understand from our conversation these are the issues and the resolution we tentatively agreed too [to]. Nothing more/Nothing less. This is what I have passed on to Kenosha and just want to make sure there is no misunderstanding between us. In turn you plan to go out to the membership telling them you are trying to get us back to the table and if you can you want there [their] vote to resolve these issues and get a contract, (without a vote). [Employer Exhibit 8].

IAM Negotiating Committee Meeting & Notice to Members, December 7-8

Anderson convened his negotiating committee in Charlotte, North Carolina on December 7-8 to discuss how the IAM would proceed. The committee agreed that the major issues which resulted in the defeat of the Tentative Agreement were wages and the $41.00 cap on non-corporate lodging. On December 8 they drafted a letter to the membership summarizing these changes to reflect the December 1-2 e-mails. The change to undecking compensation is not mentioned in the letter. The final paragraph of the letter reads as follows:

> We the undersigned, ask for your vote to authorize the National Negotiating Committee to meet with the company to resolve these issues as outlined above, and if resolved as noted, these changes will be added to the tentative agreement and the National Negotiating Committee chief negotiator will have the authority to sign the contract. [Intervenor Exhibit 4].

The letter is signed by the members of the National Negotiating Committee. Soon afterwards – the same day, at least in some terminals, the voting began.

The Short-Term Disability Issue

On or about December 7, Anderson contacted Guest by telephone and raised the issue of reinstating the short-term disability benefit that the IAM had agreed to forfeit during negotiations for the Tentative Agreement. This was the first time either party raised short-term disability as a contract issue since initial negotiations ended in early November; while the 2001 – 2005 contract included a short-term disability provision, the parties had agreed to eliminate it from the Tentative Agreement. On December 8, at 4:42 p.m., Guest sent Anderson an e-mail titled "disability", which reads in pertinent part:

> Disability OK, we will go with the $25.00, but just for the first year. It is absolutely critical that we do not get hit with any increase for this. Since the whole group does not automatically get into the plan, it depends on who does and what they make. Additionally, I need this to run concurrent with the 701 plan[4] and the first week is not covered as we do now. We can play with the language next week if we get there. [Employer Exhibit 9].

Both Anderson and Guest testified that the short-term benefit they started discussing in December 2004 for the new contract would be different from the benefit in the 2001 – 2005 contract. No evidence was provided to show that Anderson responded to the Employer's disability proposal in writing (by e-mail, signature, fax, or in any other way) until December 14.

[4] This refers to a disability plan which the membership has through IAM Local 701.

Second Vote by IAM Membership

The IAM membership's vote on the Negotiating Committee's proposal of December 8 lasted for several days. The voting was conducted much like the ratification vote in November – employees showed their IDs, signed and dated a sheet of paper which contained a typed list of all eligible voters, received a ballot, voted in secret, and placed their ballots in a box which was guarded by a neutral observer. Anderson testified that over the next few days he received very positive feedback on the vote. On Saturday December 11, Anderson instructed representatives in 3 of the Employer's 12 terminals – Dublin, Virginia; Laredo, Texas; and Cleveland, North Carolina – to count the ballots. Anderson testified that he was told the vote was overwhelmingly in favor of authorizing the committee to resolve the disputed issues in the manner stated in the December 8 letter. According to Anderson, he then directed the terminal representatives to reseal the ballot boxes and continue the vote. Anderson testified "that was when I contacted Forest Guest and told him I was very, very confident that this was a slam-dunk."

Guest testified on direct examination that he talked to Anderson several times a day while the vote was going on – he said Anderson "was getting very positive feedback as to the vote." However, when questioned by the Hearing Officer Guest testified as follows:

> HEARING OFFICER MANSFIELD: And, and had you received […] any indication from the Union whether there had been a vote by the members with respect to the issue of whether the Committee would have the authority to sign a contract or agree to a contract without subsequent ratification by the membership?
>
> THE WITNESS: I had, I had had conversation all those days that the, that the vote was taking place, and this -- my interpretation of that conversation that Mr. Anderson was getting very positive results, and at the time that we were doing this, he felt that this was going -- that they were going to be confirmed to do this.
>
> HEARING OFFICER MANSFIELD: But prior to your signing of the documents on [December] 11th and signing of the document on [December] 13th, were you ever either advised formally that that authority had been granted or provided with any

documentary proof that such a vote had taken place and what the results of that vote were?

THE WITNESS: I never was given the total results of the vote other than it passed. I never got numbers, if you're asking me that.

HEARING OFFICER MANSFIELD: No. Were you ever given any written document stating, from the Union, that there had been a vote and what the vote was and what the majority of members had voted for? Was that ever communicated to you in a written form?

THE WITNESS: Sir, I don't remember if I got that in writing or not. I know it was communicated to me, but I don't know if I got it in writing.

HEARING OFFICER MANSFIELD: It was communicated to you that they were granted that authority?

THE WITNESS: Yes.

HEARING OFFICER MANSFIELD: When was that communicated to you? What date?

THE WITNESS: I'm not sure.

[Transcript 62-63]

Events of December 11 – 14

Guest prepared, signed, and faxed a letter to Anderson on December 11. The letter essentially restates Guest's December 2 e-mail to Anderson discussed above; it addresses the same three issues (wages, undecking, and lodging) and proposes the same resolutions as does the December 2 e-mail. Anderson signed the letter on December 11. However, Anderson further testified that "When I seen it [Guest's fax of December 11] I contacted him back and told him that he had left out the supplemental insurance [short-term disability]. He said, well, we already agreed to that, you know that. I said yeah, but I want it on my document. I want it on my document as we have agreed."

Guest e-mailed Anderson Sunday, December 12, regarding, among other things, the progress of the second vote, which was still ongoing, and the short-term disability issue. The e-mail reads, in pertinent part:

> I hope […] you are also receiving good news from the terminals. […] Also, this disability thing has really caused a stir. Hope we have some wiggle room as we will need to be creative. Seems like the $ [dollar] amount is understated due to the unknown number that will want it when it becomes their costs. We are having to find another insurance company to try and cover this and stay with our price, and so far it has been a struggle. Should know more on Monday. […] [I] will be in the office tomorrow, so call me there when you have some news. [Petitioner Exhibit 6]

Guest testified that after several conversations with Anderson regarding short-term disability, he drafted another letter on December 13 and faxed it to Anderson. This letter restates the December 11 letter regarding lodging, wages, and undecking, and also includes language about the short-term disability benefit. Guest signed and dated this letter on December 13; Anderson signed and dated in on December 14. Guest and Anderson both testified that their major dispute regarding short-term disability had been whether to include the provision in a side letter or in the body of the contract. No evidence was produced, however, to show that the provision had been written and/or signed by both parties in any form – side letter, memorandum of agreement, or contract language – prior to the December 13/14 letter. When asked on direct examination about the late addition of the short-term disability provision to the contract, Anderson testified as follows:

> Q. BY MS. MCHUGH: Why did you add the disability to the December 13th agreement when it wasn't in the December 11th agreement?
>
> A. Because it was very important. I told my committee that we had that. One of the things that have been a major, major problem administrating the contract, the prior contract was there, there were so many deals that was made through the local reps that no one knew about it or they had a hidden agreement here and the other terminals didn't know about it, and it was, it was important that I wanted it in black and white in the contract. I made a promised to my members that everything that we would agree upon would be in the contract… [Transcript 197-198]

Meanwhile, voting was still ongoing at the terminals regarding the December 8 letter. Anderson testified that unit members stopped voting December 13 or 14. The ballots were counted shortly thereafter; the employees voted in favor of signing a contract pending resolution of the wage and undecking issues as outlined in the December 8 letter.

The Petitioner filed the instant petition on December 14. Guest testified that he was made aware the petition was being filed on December 13.

December 17 – the signing of the contract

The parties and their negotiating committees met in Kansas City, Missouri to sign a single document incorporating all of the changes to the original Tentative Agreement. Initially, the parties passed out copies of the changes to the negotiating committee and one of the members pointed out that the document contained language on lodging reimbursement which Anderson and Guest had previously agreed to delete. At this point, Anderson left the room with another IAM representative; they were not accompanied by anyone from ATT. When they returned, they said the document was incorrect, collected it, and handed out a corrected version. The corrected version of the "Agreed to Changes to the TA" was initialed and signed by Guest and Anderson on December 17. Immediately after the title, the document contains the following language: "Per the December 13, 2004 agreement of the parties, the final agreement shall reflect the following changes to the Company's final offer dated November 10, 2004."

Analysis: Overview

Board law regarding contract bars is stable and uncontroverted. The burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park,* 187 NLRB 517 (1970). The operative principles are set forth in any number of cases, including *Seton Medical Center*, 317 NLRB 87 (1995):

> In order for an agreement to serve as a bar to an election, the Board's well-established contract bar rules require that such agreement satisfy

> certain formal and substantive requirements. As set forth in the seminal case clarifying these requirements, *Appalachian Shale Products,* 121 NLRB 1160 (1958), the agreement must be signed by the parties prior to the filing of the petition that it would bar and it must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. The agreement, however, need not be embodied in a formal document. An informal document or documents, such as a written proposal and a written acceptance, which nonetheless contain substantial terms and conditions of employment, are sufficient if signed. *Appalachian Shale*, supra at 1162; *Georgia Purchasing,* 230 NLRB 1174 (1977).

The Board does not require that an agreement delineate completely every single one of its provisions in order to qualify as a bar. *USM Corp.,* 256 NLRB 996 (1981); see also *St. Mary's Hospital,* 317 NLRB 89 (1995)(contract bar found where every provision – all outstanding issues – were included in informal documents comprising the contract: relevant inquiry is whether parties reached written agreement on all issues, not whether there are minor deviations within a particular issue between drafts); *Georgia Purchasing,* 230 NLRB 1174 (1977)(bar found even though documents subsequent to filing of petition contained "refinement of language" of some issues). However, in order to operate as a bar, the contract must, in a writing signed by both parties, reflect the parties' full and total agreement. *Seton Medical Center,* above; see also *DePaul Adult Care Communities, Inc*., 325 NLRB 681 (1998). The policy behind this requirement is clearly set forth in *Appalachian Shale* at 1163*:* "real stability in industrial relations can only be achieved where . . . the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems."

Unlike the positive obligations enumerated above, which are necessary to show contract formation under the contract bar doctrine, ratification of an agreement by union membership is not a condition precedent to contractual validity unless the parties make it so by express contractual provision. *Appalachian Shale,* above at 1163; see also *United Health Care Services*, 326 NLRB 1379 (1998). Where ratification is a condition precedent, the condition is deemed fulfilled when the employer receives notice that the contract has been ratified. Only at that point does the contract operate as a bar. *Teamsters Local IBEW 703 (Testa Produce),* 320 NLRB 1184 (1996); *Swift & Co.*, 213 NLRB 49 (1974). Again, the Board spelled out the policy

considerations underlying its rules on ratification in *Appalachian Shale*, above at 1164, noting that the absence of such a clear rule "has resulted in conflicting testimony and protracted hearings, creating contested factual issues for the Board to resolve…every effort should be made to eliminate the litigation of factual issues such as these in representation cases and to give greater weight to the language of the contract itself."

For several reasons, I find that no contract existed sufficient to bar the petition prior to December 14. First, I find that the parties did not reached a complete agreement within the meaning of Board law in this area until December 14, the same day the instant petition was filed and one day after the Employer had notice of the filing. Additionally, I find that the parties established ratification by the membership as a condition precedent to contract execution, and that condition had been neither fulfilled nor waived prior to December 14. Finally, as explained below, I note that the Petitioner's original petition – Case 5-RC-15801, filed December 3 – may arguably raise a question concerning representation, thus making December 3 the operative date to consider a contract bar. Of course, I find that no bar existed on December 3.

The Parties Did Not Reach Sufficient Agreement to Create a Contract Prior to December 14

As discussed above, the law requires that to successfully establish a contract bar, the parties must show (a) writings, (b) signed by both parties, (c) which reflect the parties' complete agreement. See, e.g., *Pontiac Ceiling & Partition Co.*, 337 NLRB 120 (2001). In this case, the parties simply did not meet these criteria until both Guest and Anderson had signed the document dated December 13-14 which incorporates the short-term disability provision.

It is incontrovertible that the parties did not meet requirements (a) and (b) with respect to the short-term disability provision until December 13 and 14. As discussed in detail above, the Tentative Agreement contains no language whatsoever regarding this issue. Neither party mentioned it in writing until Guest's e-mail of December 8. That e-mail does not suffice to establish a writing signed by both parties for two reasons; first, it is quite vague, and more important, Anderson did not respond to it in writing. Indeed, while Anderson and Guest both testified that they had many telephone conversations about short-term disability, as well as a

'meeting of the minds' about the substance of the benefit, the law is clear: no contract bar can exist without a writing, signed by both parties. See, e.g., *Branch Cheese*, 307 NLRB 239 (1992). Guest again e-mailed Anderson about the short-term disability benefit on December 12; this e-mail fails to establish a bar for the same reasons. Like the December 8 e-mail, Anderson did not respond in writing. And like the December 8 e-mail, the written communication of December 12 cannot be construed as a writing setting forth the terms and conditions of the benefit. The e-mail contains no language regarding dollar amounts, effective dates, eligibility, or any other specifics for short-term disability. As discussed more fully in the facts section above, Guest writes "this disability thing has really caused a stir. Hope we have some wiggle room . . . We are having to find another insurance company . . . and so far it has been a struggle." In order to have valid contract formation, the Board has held "subjective understandings as to the meaning of terms…are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard." *Ethan Enterprises, Inc.,* 342 NLRB No. 15, slip op at 9 (2004)(internal citations omitted). Under a reasonable standard – the plain language of document at issue, Guest's December 12 e-mail – the terms are utterly unclear. The first time the contracting parties affix their signatures to a writing containing terms and conditions relating to the short-term disability provision is on December 13 (for Guest) and December 14 (for Anderson).[5]

The Employer and the Intervenor argue that the short-term disability provision should not be part of the contract bar analysis. They argue that all other provisions of the contract had been reduced to writing and signed by December 2, and as of that date, even without the short-term disability benefit, the contract was complete as a matter of law. The parties argue that as of December 2, the contract contained 'substantial terms and conditions of employment' under Board law, and thus should be upheld as a bar. The Employer and Intervenor claim that as long

[5] Both the Intervenor and the Employer argue that e-mails may constitute "signatures" for the purposes of creating a contract bar. For this proposition they cite, inter alia, *Georgia Purchasing,* 230 NLRB 1174 (1977), where the Board found a bar based on the parties' exchange of telegrams. While I find their argument persuasive, I need not reach that issue in this case – as noted above, even if Guest's e-mails on December 8 and 12 are deemed signatures, Anderson did not affix his signature to any sort of writing [fax, e-mail, etc.] regarding the disability benefit until December 14.

as signed writings between the parties contain "substantial terms and conditions of employment" it acts as a bar; other terms, they suggest, may be negotiated and/or added to the text of the collective-bargaining agreement itself on an ongoing basis. A review of Board law on the subject belies this argument.

The Board in *Appalachian Shale* set forth the requirement that in order to act as a contract bar an agreement must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. Implicit in that requirement, however, is the knowledge that each bargaining relationship is different, and terms and conditions sufficient to stabilize one bargaining relationship may be inadequate to stabilize another. Indeed, it seems clear that the Board has never set forth a list of which terms and conditions of employment would be deemed "substantial" for contract bar purposes for precisely that reason: it is a bedrock principle of Board law that the nuances of the bargaining relationship are best left to those who truly understand them -- the parties themselves. Board law in this area is not designed to determine what constitutes 'substantial' terms and conditions in each bargaining relationship. Rather, it is designed to balance the competing policies of creating stability in industrial relations and protecting employees' freedom of choice in selecting a bargaining representative. As noted above, the Board in *Appalachian Shale*, 121 NLRB 1160, 1163, has held that "real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationships, and the parties can look to the actual terms and conditions of the contract for guidance in their day to day problems." In determining whether a contract contains terms and conditions sufficient to create a bar, the Board has consistently looked to whether the parties signed writings including each and every issue which <u>they want to be included</u> in a contract, all before the filing of a rival petition. If they have included all of the issues which end up in the final contract, the writings are generally sustained as a bar even though each issue has not been completely delineated or refined. See, e.g., *Pontiac Ceiling & Partition Co.*, 337 NLRB 120 (2001)(though document was undated, it comprised a contract bar when there was uncontroverted testimony that all parties had signed it well before rival petition filed and document "reflects the complete

agreement of the parties."); *St. Mary's Hospital,* 317 NLRB 89 (1995)(contract bar found where every provision comprising the contract was included in informal document – relevant inquiry is whether parties reached written agreement on all issues, not whether there are minor deviations within a particular issue between drafts); *USM Corporation,* 256 NLRB 996 (1981)(contract operated as a bar where a complete agreement was signed several months prior to rival petition, but that during term of contract the parties disagreed over contract interpretation). When, however, all issues are not identified in these pre-petition writings – in other words, where the parties continue to add benefits or other terms which are nowhere referenced in signed pre-petition writings -- the contract does not serve as a bar.

In this case, the IAM's own chief negotiator testified that it was "very important" that short-term disability benefits be included in the contract. As noted above, he testified that "I told my committee that we had [to have] that [short-term disability]. One of the things that have been a major, major problem administering the contract, the prior contract was there, there were so many deals that was made through the local reps that no one knew about it or they had a hidden agreement there and the other terminals didn't know about it." This is precisely the reason for the requirement in *Appalachian Shale*, above at 1163, that a contract include substantial terms and conditions of employment – in order to serve as a bar, a contract must be sufficient for the parties to look to it for guidance in their day-to-day problems. Clearly, at least one of the parties to the contract – the IAM – harbored concerns that if the short-term disability provision did not appear in the text of the contract, the parties would have 'major problems' administering the collective-bargaining agreement. For this reason, Anderson insisted that this provision be included in the contract, and as discussed above, that did not occur until December 14. The IAM and ATT thus did not have a complete contract sufficient to serve as a bar until that date.

The cases cited by the Intervenor and the Employer on this point are inapposite. The parties cite *Stur-Dee Health Products, Inc.*, 248 NLRB 1100, 1100-1101 (1980), for the proposition that the Board "has never held that a failure of a contract to contain or delineate

every possible provision which could appear in a collective bargaining agreement negates the bar quality of such a contract." This principle is inapplicable to the situation at hand. As discussed above, the Board has never required that a contract cover every imaginable contingency in order to serve as a bar – it is beyond cavil that contracts require varying substantive provisions and levels of specificity in order to conform to the particularities of each bargaining relationship. The relevant inquiry is whether the parties have included, in some form, all of the terms and conditions they know are necessary to creating a complete contract. The parties also cite *USM Corp.,* 256 NLRB 996 (1981), and *St. Mary's Hospital,* 317 NLRB 89 (1995), to support their position. As discussed above, these cases are distinguishable on their facts. In both *USM* and *St. Mary's*, the parties had signed documents containing language regarding each and every provision which ended up in the final contracts well before a rival petition was filed. In both of those cases, the parties tweaked the language of certain provisions in subsequent weeks and months, but there was no argument that the scope of the agreements themselves did not expand. In the instant case, the Employer and Intervenor would urge a decision stating, in effect, that as long as the parties agreed to certain core issues, their agreement could stand as a bar while they continued to negotiate on other important terms and conditions of employment, and then, at some later date, include them in the contract. For the reasons stated above, I believe this position runs counter to both the letter and the spirit of Board law in this area, and I decline to adopt it.

Because the parties did not execute signed writings concerning short-term disability before December 14, I find that no bar existed prior to that date. The Petitioner filed the instant petition on that same day -- December 14. The Employer's chief negotiator, Forest Guest, testified at hearing that he was on notice the petition would be filed as of December 13. Board law is clear that a contract executed on the same day that a petition is filed will not bar an election if the employer had actual notice at the time of execution that a petition has or will be filed. *Rappahannock Sportswear Co.,* 163 NLRB 703 (1967). Thus, the contract the parties executed on December 14 does not bar the petition filed on the same date.

<u>The Parties Did Not Satisfy (or Remove) Ratification as a Condition Precedent to Contract Formation Prior to December 14</u>

Based upon the analysis above, I find that the petition in Case 5-RC-15805 is not contract-barred. I find no bar even assuming, arguendo, that execution of the contract was not dependant upon membership ratification. However, as an additional basis for my decision I find that ratification was a condition precedent which had not been satisfied or removed at the time the petition was filed, and for this additional reason the contract can not operate as a bar.

Board law is clear that when ratification of an agreement is expressly required in the text of a contract, it will serve as a condition precedent to the execution of a contract which can bar an election. If ratification exists as a condition precedent, "it effectively prevent[s] effectuation of [the contract's] other terms for so long as that condition precedent remain[s] unmet, or until the unfulfilled condition itself is effectively removed in some manner by agreement of the contracting parties." *Perma Coatings, Inc.*, 293 NLRB 803, 818 (1989). "A party may waive a condition precedent…either by specific written withdrawal of that condition, or by conduct sufficiently explicit in nature and implication to accomplish the intended purposes and effects of the condition." *Ben Franklin National Bank,* 278 NLRB 986, fn. 8 (1986). If ratification as a condition precedent is not removed/waived, the Board finds it fulfilled when the employer receives notice that the contract has been ratified. *Teamsters Local IBEW 703 (Testa Produce),* 320 NLRB 1184 (1996); see also *Swift & Co.*, 213 NLRB 49 (1974).

No party in the instant case disputes that ratification was included by express textual provision as a condition precedent to executing the Tentative Agreement. However, the Employer and the Intervenor contend that they removed ratification as a condition precedent subsequent to the failure of the ratification vote. They point to the parties' exchange of e-mails on December 1-2 to support this claim. My reading of the e-mails, quoted in pertinent part in the facts section above, is that they are ambiguous at best. While the parties certainly agree that the ratification requirement be modified – from a full ratification vote to a vote to authorize the negotiating committee to sign a contract if and only if the Employer agreed to certain changes in terms and conditions – it is not at all clear that the parties agreed that this second vote was unnecessary to the execution of a final agreement. The issue becomes even less clear

when looking at other documents; specifically the December 8 letter to the bargaining unit, which suggests that elimination of the ratification requirement is itself contingent upon their approval, and Guest's December 12 e-mail to Anderson – an e-mail sent when the second vote is ongoing at all of ATTs terminals -- stating that he hopes Anderson is getting good news from the terminals, and that he is awaiting this news. Compare *Perma Coatings, Inc.,* 293 NLRB at 318 (condition precedent removed via express waiver language signed by parties).

The Board in *Appalachian Shale* sought to clarify the ratification requirement in contract bar cases for important policy and administrative reasons. The Board developed the requirement that ratification be expressly stated in order to operate as a condition precedent so as to avoid "conflicting testimony and protracted hearings, creating contested factual issues for the Board to resolve . . . [E]very effort should be made to eliminate the litigation of factual issues such as these in representation cases and to give greater weight to the language of the contract itself." 121 NLRB at 1162. In keeping with the dictates of that seminal case and its progeny, I decline to become embroiled in the briar patch of parole evidence interpretation. The language of the Tentative Agreement makes it perfectly clear that ratification is a condition precedent to contract execution. The parties did not, either by words or by conduct, make it explicit that they were removing this condition precedent. I therefore find that, in order to execute the contract, the membership had to eliminate the ratification requirement in accordance with the terms of the second vote.

I note that the IAM membership did in fact approve the second vote and authorize the negotiating committee/chief negotiator to sign a contract if the Employer agreed to certain wage rates and changes in the lodging provisions. However, it is unclear when the Employer was notified of this modified ratification: as discussed above, while Anderson testified that he notified Guest of the results of the vote on December 11, Guest testified that he did not recall when he was so informed and no other evidence was provided to support Anderson's claim.

Thus, I can not find that the condition precedent was satisfied as of December 11.[6] To the contrary, Guest's e-mail of December 12, 2004, stating, inter alia, "I hope…that you are also receiving good news from the terminals . . . call me when you have some news," suggests that the Employer, at least, was still waiting to be informed of the results of the vote. Compare, e.g., *Superior Coffee,* 308 NLRB 1 (1992); *Westinghouse Electric Corp.,* 111 NLRB 497 (1955).

The Teamster's December 3, 2004 Petition May Raise A Question Concerning Representation

For the reasons detailed above, I find that no contract bar existed on December 14, the date Petitioner filed the instant petition. Since I find no bar existed on December 14, it is obvious that I find no contract bar as of December 3, the date the Petitioner filed its initial petition in Case 5-RC-15801 with Region 5. The Petitioner contends, however, that December 3 should be the relevant date for any contract bar inquiry.

When one petition under Section 9(c) is timely filed, and a second petition is filed during the pendency of the unresolved question concerning representation raised by the earlier one, the contract bar doctrine is rendered inoperative as to the later petition. *Weather Vane Outwear Corp.,* 233 NLRB 414, 415 (1977); *General Dyestuff Corp.,* 100 NLRB 72, 74 (1952). The Petitioner submits that the original petition in Case 5-RC-15801, and the petition as amended in the alternative by the Petitioner's written amendment on December 10, properly raised a question concerning representation. The original petition in Case 5-RC-15801 was for all of ATT's employees at issue in this case except for the Dublin, Virginia terminal. However, on December 10, the Petitioner sought to amend the petition in Case 5-RC-15801 to state that if the undersigned determined the only appropriate unit must encompass the Dublin employees, the Petitioner wished to amend the petition to include those employees.

[6] Of course, even assuming arguendo that the condition precedent had been satisfied as of December 11, the parties did not have a contract bar because of the short-term disability issue, for the reasons discussed in the previous section.

When a petition is amended after filing, even during the hearing itself, the filing date of the original petition is controlling if the employer and the operation or employees involved were contemplated by or identified with reasonable accuracy in the original petition, or if the amendment does not substantially enlarge the character or size of the unit or the number of employees covered. *Centennial Development Co.,* 218 NLRB 1284, 1285 (1975). See also, *William W. Fitzhugh, Inc.,* 88 NLRB 537, 539, fn. 6 (1950) and *Continental-Diamond Fibre Co.,* 83 NLRB 1143, fn. 3(1949)(properly supported petitions stating units in the alternative raise a question concerning representation where the Regional Director finds one of the alternatives appropriate).

The question concerning representation sought to be raised in the Petitioner's original petition in Case 5-RC-15801 is certainly unresolved – my dismissal of that petition currently is pending a request for Board review. The issue remains, however, whether it presents a question concerning representation under Section 9(c)(1) of the Act. "The petitioning union generally will satisfy this requirement if it can demonstrate that it is a 'labor organization' as defined under the Act, that the employing entity is a covered 'employer' whose business affects commerce, and that there is a sufficient showing of interest among 'an appropriate unit' of employees to put the question of union representation to a vote." *Food & Commercial Workers Local 23 (S & I Valu King)*, 288 NLRB 986, 987 (1988). The undersigned dismissed that petition not because the Petitioner did not satisfy these technical requirements, but for the reasons stated in the dismissal letter. In view of the rationale set forth earlier in this Decision, it is unnecessary for me to decide the *Weather Vane* issue; however, I acknowledge that the operative date for determining whether a contract bar exists herein may be December 3 under *Weather Vane Outwear Corp.,* and its progeny.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. Petitioner, Teamsters Local Union Nos. 71, 171, 223, 299, 512, 557, 657, 745, 773, 878 & 957 a/w International Brotherhood of Teamsters, a labor organization as defined in Section 2(5) of the Act, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated that Auto Truck Transport Corporation, a Georgia corporation, with facilities at various locations including Baltimore, Maryland, is engaged in the business of transporting new trucks from a manufacturer to the manufacturer's customers. During the preceding 12 months, a representative period the Employer derived gross revenues in excess of $50,000 from the delivery of goods from its Baltimore, Maryland facility directly to customers located outside the State of Maryland.

6. There is a relevant history of collective bargaining for the Employer's employees; the petitioned for-unit has been represented by the Intervenor in this matter, the International Association of Machinists and Aerospace Workers, AFL-CIO. The parties have a collective-bargaining agreement, the effective dates of which are November 1, 2004 – October 31, 2007. I find that the contract does not operate as a bar to the Petitioner's petition.

7. The parties stipulated, and I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All driveaway lowboy drivers, yard employees, and shop employees employed by the Employer at its facilities in Portland, Oregon; Laredo, Texas; Garland, Texas; Conway, Arkansas; Jacksonville, Florida; Springfield, Ohio; Dublin, Virginia; Detroit, Michigan; Macungie, Pennsylvania; Cleveland, North Carolina; Mt. Holly, North Carolina, and Baltimore, Maryland; but excluding all other employees, including independent contractors, confidential employees, professionals, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be

represented for purposes of collective bargaining by the **International Association of Machinists and Aerospace Workers, AFL-CIO**, the **Teamsters Local Union Nos. 71, 171, 223, 299, 512, 557, 657, 745, 773, 878 & 957 a/w International Brotherhood of Teamsters,** or **Neither.** The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

(overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **SEPTEMBER 21, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

D. Notice of Electronic Filing

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **SEPTEMBER 28, 2005**. The request may not be filed by facsimile.

(SEAL) WAYNE R. GOLD

Dated: SEPTEMBER 14, 2005

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
103 S. Gay Street
Baltimore, MD 21202